should determine at what point Mercantile would be likely to enter the market. If Mercantile can enter either market within two or three years, we assume (absent contrary evidence) that each market will remain sufficiently concentrated so that Mercantile's procompetitive efforts are legally required. If Mercantile will not enter until much later, then the Board should assess the volatility of the two markets to determine the fairness of predicting whether they will still be concentrated at the time when Mercantile is likely to enter. A market's structure may or may not be predictable for five years; after that point, only the most stagnant market will support the extrapolation of present data. In a heavily regulated industry, banking would not seem a likely candidate for the seer; regulatory change can quickly alter the structure of the market.[28]

IV.

We have attempted to define comprehensible standards in a difficult area of antitrust law. We hope that our suggested analysis will provide a framework for determining the validity and applicability of the potential competition doctrine. We look forward to any refinements that the parties may develop in the Board's further proceedings below. While we regret delaying the final disposition of Mercantile's application, we believe that further proceedings will better insure that the proper disposition is reached.

[25] To summarize: we hold that the Board may invalidate a proposed bank holding company merger on anticompetitive grounds only if the merger would violate the explicit antitrust standards contained in the 1966 amendments to the Bank Holding Company Act. We remand the application to the Board for the following findings:

1. Whether the existence of other actual potential competitors indicates that the elimination of Mercantile from their ranks will have a significant anticompetitive effect.
2. Whether there is a reasonable probability that Mercantile will enter the El Paso and Waco markets independently if the present application (and merger with any other dominant firm in the two markets) is rejected. This finding should be made only after considering what factors would dispose Mercantile to prefer these opportunities for investment to other likely opportunities.
3. Whether Mercantile's entry *de novo* or by toehold acquisition will result in ultimate deconcentration of the two markets or in other significant procompetitive effects.

REMANDED.

28. For example, the elimination of federal restrictions on interstate banking would quickly multiply the number of actual entrants by including the large bank holding companies of New York, Chicago, and California as possibilities.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Plaintiff-Appellant,

v.

Gabriel CAZARES, Defendant-Appellee.

Nos. 78-3100, 79-1840.

United States Court of Appeals, Fifth Circuit.

March 9, 1981.

Action was brought against mayor by the Church of Scientology which alleged that mayor violated civil rights of church and its members and defamed church. The United States District Court for the Middle District of Florida, Ben Krentzman, J., granted summary judgment in favor of mayor on the civil rights claim and dismissed defamation claim, and appeal was taken. The Court of Appeals, Kravitch,

See Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978) (award of attorneys' fees proper where plaintiffs prevail on pendent nonconstitutional statutory claim, if civil rights claim substantial and pendent claim arises from same nucleus of facts); *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423 (8th Cir. 1978) (fact that plaintiff prevailed on nonfederal claim did not render inappropriate award of attorneys' fees since constitutional claim was substantial and claims arose from same nucleus of facts); *Seals v. Quarterly County Court*, 562 F.2d 390, 393-94 (6th Cir. 1977) (attorneys' fees justified where plaintiffs filed a voting rights case under § 1983 but actually prevailed on a state claim based on same operative facts). *Maine v. Thiboutot*, — U.S. —, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); *see also* (Attorneys' Fees Act applies to cases decided on statutory as well as constitutional grounds); *Maher v. Gagne*, — U.S. —, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980) (in dicta), the Court stated, "Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act.").

[24] In the present case both counts arose out of the same nucleus of facts. Indeed, the first complaint filed by appellant alleged the defamatory statements by defendant as a part of the § 1983 claim. Because a defamation claim may not serve as the basis of a § 1983 suit, appellant was required to amend its complaint and plead the alleged defamation as a separate count. Appellants did not file the Third Amended Complaint until two years after the original complaint. Under these circumstances, it would be impossible to accurately apportion the time appellee's attorneys spent on the civil rights claim and on the nonfederal defamation claim. We hold, therefore, that the district court did not err in granting attorneys' fees for the entire case.

Appellant next argues that the district court erred in awarding attorneys' fees to Cazares in view of the fact that he was covered by insurance. According to the Church, under *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), a party cannot be awarded a higher fee than he is contractually obligated to pay: since Cazares was covered by insurance, he was not contractually obligated to pay any fee and thus should not be awarded any fee.

[25] This argument ignores Cazares' at- [illegible] was one of indemnity: that the company was not required to pay unless Cazares was obligated to pay after termination of the case. *See also Perez v. Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978), where an award of attorneys' fees was not precluded by the fact that the litigants were represented by attorneys of a publicly funded corporation and were not charged for legal services they received in a 42 U.S.C. § 1983 action.

Finally, appellant contends that the court erred in awarding Cazares attorneys' fees without allowing the Church to depose Cazares' attorneys as to the time and nature of their services. Cazares' attorneys argue that the Church's proposed depositions were acts of harassment and that forcing the attorneys to go over their time slips would be an undue burden. The judge issued a protective order and held an evidentiary hearing at which the question of discovery was considered. The court then ordered the case to proceed without further discovery as to the exact amount of time expended by Cazares' attorneys.

[26] It does not appear that further discovery was warranted. The Church had interrogated Cazares' attorney at length. The attorney had provided in his affidavit a detailed record of time spent and duties performed. Besides, under *Johnson*, time spent on a claim is only one factor to be considered in the award of fees.

In *Cruz v. Beto*, 453 F.Supp. 905 (S.D. Tex.1977), *aff'd*, 603 F.2d 1178 (5th Cir. 1979), the district court noted:

> defendants apparently misconstrue the role of the Court in computing a reasonable fee. The Court is not required to calculate, nor are plaintiffs obligated to prove, a reasonable fee with "mathematical precision". *Johnson*, *supra* at 720. This is especially true where the need for

trial court abused its discretion in limiting discovery.

VI. *Attorneys' Fees*

After granting defendant's motions for summary judgment, the district court considered defendant's application, as the prevailing party in the § 1983 count, for the award of attorneys' fees. The court granted the defendant's motion for fees and directed the parties to submit affidavits or other evidence as to the amount thereof.

The court next conducted an evidentiary hearing in which it considered and made findings with regard to each of the criteria suggested in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). The court's award to Cazares of $36,921.75 in attorneys' fees is appealed by the Church.

In § 1983 actions, awards of attorneys' fees are governed by 42 U.S.C. § 1988, which states in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs.

The court's discretion is limited, however, to the extent that a prevailing defendant can recover only if the plaintiff's claim was "frivolous, unreasonable, or groundless, or . . . plaintiff continued to litigate after it clearly became so." *Lopez v. Aransas County, Independent School District*, 570 F.2d 541, 545 (5th Cir. 1978), *citing Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 98 S.Ct. 694, 701, 54 L.Ed.2d 648 (1978).

In the present case the Church argues the action was not frivolous, unreasonable or groundless because: (1) the court sustained the complaint for over two years; (2) evidence supported the claim; and (3) the judge himself stated the action presented novel legal issues.

[21, 22] The fact that the court sustained the complaint for over two years is a tribute to the trial judge's patience and fairness, not an indication of his view of the merits.[15] Furthermore, as we pointed out in Part III, *supra*, there was no material, admissible evidence to support the Church's civil rights claim. Moreover, although the judge stated that the action presented novel legal issues, this comment does not preclude a finding that the claim was groundless. Obviously, it was the question of standing, which had little to do with the merits of the claim, that presented the difficult legal issues.

[23] We agree with the trial court that the civil rights action was frivolous, unreasonable and groundless. Accordingly, an award of attorneys' fees to the defendant was justified.

There is no statute providing for attorneys' fees in a diversity defamation action. Thus, had this suit been brought only on Count II, attorneys' fees would not have been recoverable. Fees were recoverable on Count I, however, and here the court based its award on both the civil rights and the defamation action. The court explained:

> The terms of the statute quoted above [42 U.S.C. § 1988] would not preclude an award for the entire case, and at least one court has found that the provision applies to the entire case where plaintiff joins claims some of which qualify for fees under 42 U.S.C. 1988, and which ordinarily would be tried in one proceeding. *Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891, 894 (D.Or.1977). The Court concludes that attorneys' fees may be awarded for the entire case if otherwise appropriate.

Several circuits have held that where a civil rights claim is made, a successful claimant may also collect attorneys' fees concerning legal actions or counts which come from or arise out of the same common nucleus of facts."

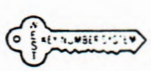
15. During these two years, the complaint was amended three times, primarily in order to clarify the defamation claims

documentation and specific listings of times and dates to support plaintiffs' request is at a minimum because of the Court's intimate acquaintance with the litigation. Rather, so long as the Court can reasonably ascertain, either on the basis of supporting time sheets or through its independent perception of counsel's efforts and abilities, that the hours claimed by counsel in their affidavits are a rational reflection of the services performed, the prevailing party will have fulfilled its burden of proof. Thus, although the preferable and less-risky course of action is for counsel to keep detailed time records to be submitted with a fee request, counsel's failure to do so is not fatal to plaintiff's application in this particular case.

[27] Here, the court indicated it was intimately familiar with the litigation and was satisfied with the correctness of its award which it considered extremely low. We find no abuse of discretion.

In summary, we hold: (1) the Church had representative standing in the § 1983 action; (2) the district court correctly dismissed three allegedly defamatory allegations; (3) the district court correctly entered summary judgment on both counts; (4) the district court correctly found the civil rights claim was frivolous, groundless, and unreasonable and appellee was entitled to attorneys' fees; (5) the fees were properly based upon the entire case, both counts arising from one nucleus of facts; (6) the district court correctly awarded attorneys' fees to Cazares although he was covered by insurance; and (7) the district court correctly refused to allow the Church to depose Cazares' attorneys as to the time and nature of their services.

Accordingly, the judgment is AFFIRMED.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Vernon Horace TUCKER and Marion Benten Morton,
Defendants-Appellants.

No. 80-1012.

United States Court of Appeals,
Fifth Circuit.
Unit A

March 9, 1981.

Rehearing and Rehearing En Banc Denied April 16, 1981.

Defendants were convicted in the United States District Court for the Eastern District of Texas, William Wayne Justice, Chief Judge, of conspiracy and conducting an illegal gambling business. Defendants appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) a waitress employed by the gambling enterprise performed functions necessary to or helpful in the operation of the business and could be included to meet the five-person requirement of the gambling statute; (2) the substantiality requirement of the statute did not require a showing that the same five persons operated the business for more than 30 days; (3) the trial court's failure to admit into evidence the Government's bill of particulars response was not prejudicially erroneous; (4) an affidavit was sufficient to justify the issuance of a search warrant; and (5) the evidence was sufficient to sustain one defendant's conviction.

Affirmed.

1. Gaming ⇐62

Waitresses who served drinks to gamblers, made change for them to use in placing bets in cash game, and delivered phone messages to them performed functions necessary to or helpful in operation of gambling business and could be included to establish violation of statute prohibiting the conduct of illegal gambling business involving five or more persons. 18 U.S.C.A. § 1955(b)(1)(i).